IN THE

# Supreme Court of the United States

OCTOBER TERM, 1961

No. 283

JAMES VICTOR SALEM,

*Petitioner,*

—against—

UNITED STATES LINES COMPANY,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## PETITIONER'S REPLY BRIEF

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Respondent's brief avoids the major question of whether a Jones Act jury's verdict should be set aside, despite a sufficiency of evidence, because of the absence of testimony for either side by an expert on naval architecture with respect to a simple issue of obvious danger. The question is not on the sufficiency of evidence to support the jury's verdict, but rather its *weight* as determined by the medium for its presentation. Simply stated, should we be restricted hereafter to experts pitted against experts, or continue presenting proof as in the past?

The equal split of the Court of Appeals *en banc* bespeaks the importance of this case and the paramount need for its resolution by this highest Court. We do not bring up for review the "question of sufficiency of the evidence and witness credibility" as respondent strangely contends in its first point, for the Court below concedes sufficiency of

1. Where respondent refers to "appliances readily at hand" and asks what "safety devices" and railings should have been installed, it ignores the record replete with proof and testimony that there were no adequate appliances at hand and that the bulky radar casing and the thin stiffeners were unreasonable for use as handholds. These contentions were made to the jury who had the benefit of respondent's diagram and photographs in evidence.

2. Respondent cannot minimize its failure to provide a railing, a life-line, a guide rope, or a platform that was not smooth and partly worn away without skid proof paint, which would have stayed or lessened petitioner's backward movement without anything at hand, to fall over, and then into the unprotected hole he was compelled to cross in complete darkness. Their need, absence and relationship to the accident were jury questions properly resolved. Clear and convincing proof of maritime negligence and unseaworthiness, compounded by the protracted malfunction of four of the five light bulbs, and the foreseeable blowout of the fifth that occurred, cannot be ignored by an unrelated contention that the case hinged on a "theory that its vessel was negligently constructed without proving any standards of proper naval architecture."

3. Petitioner will not comment on respondent's difference with a portion of the opinion it seeks to have affirmed, as to where petitioner was located when he slipped and fell. It was for the jury to decide whether in total darkness petitioner could have safely crossed the platform and save his fall had the railing or a simple safety device been provided. Petitioner proved the conditions of a smooth and worn platform, the bulky radar casing with electrical wiring therein, and the nature of stiffeners of such narrow and insignificant dimensions, that the jury would not be-

lieve they were reasonable handholds under the circumstances. Rhetorically stated, should petitioner be denied recovery for not having reached out in total darkness for some inadequate hand support, while understandably confused by fear of the predicament imposed on him by respondent, particularly where he testified ". . . but I don't have the time yet to grab it" (R. 28)?

4. Respondent's stress on the absence of prior accidents did not blind the jury to the truth of the singular circumstance of all five lights out to leave the area in total darkness, where before there had been the absence of four lights for a considerable time, and the testimony by all witnesses who used the radar tower on the multiple dangers involved. Again respondent asks this Court to decide a factual issue that had already been resolved. The Court below discussed respondent's contention on a purported duty of petitioner to report a condition of danger that had long existed and was known to its responsible personnel, and held against respondent on the principle that ". . . it is not proper for this court to retry factual issues where there is evidence to sustain the finding below. There is such evidence in this case" (R. 206).

5. Respondent states that the crow's nest on the S.S. United States is of "vastly different construction" from the crow's nests on other vessels. If so, in this case a qualified expert on naval architecture would necessarily be one related to the design and manufacture of this singular structure. Could petitioner expect such person to give testimony in his behalf on the need of railings and other safety devices? Respondent candidly responds by admitting on page 2 of its brief that "The petitioner and his witnesses were experienced with such ladders . . ."

6. Respondent vaguely refers to "other errors" still undecided, additional to its contentions on negligent rescue and petitioner's duty to report and replace the burned out lights, which the opinion below did discuss and decide against respondent. One of respondent's major examples on "other errors", however, is set forth on page 11 of its brief. It concerns the exercise of discretion by the trial Court in excluding a certain deceptive wooden mock-up and cut-away model of the crow's nest platform. The reasons for petitioner's objection to the prejudicial effect of this model and the Court's ruling after viewing it with counsel, are expressed on the record (R. 12, 102). Respondent's contention of "other errors" than those recited above have even less merit.

7. Respondent improperly seeks to involve this Court in the "very serious dispute as to the nature and extent of petitioner's injuries", which has been resolved by a jury verdict for petitioner. It misleads the Court by stating petitioner did not undertake rehabilitation treatment. The record reference (R. 167) shows only that petitioner cancelled his first appointment with the rehabilitation center and was given a new appointment to return on December 16th, a date subsequent to conclusion of the trial. Respondent's counsel should know petitioner is still "not fit for duty," undergoing rehabilitation, and has opened the door to proof the Court may request during oral argument on petitioner's present program of rehabilitation.

8. The trial Court recorded its reasons for granting petitioner three years future maintenance (R. 139). The medical proof is substantial in support of its exercise of discretion to make the award. Though the humane and proper finding and conclusion on future maintenance were oral and concise, they nonetheless comply with Rule 52

F. R. C. P. where an exact form is not prescribed. Respondent significantly does not discuss or support the erroneous remand of the maintenance cause by the Court below which states in part that ". . . the Supreme Court seems to have indicated that no payments should be made for future maintenance and cure."

## CONCLUSION

In full context of the record there was no basis grounded in principles of evidence or applicable maritime law to disturb the findings by the jury and Court in favor of petitioner. It is respectfully submitted that the decision of the Court of Appeals should be reversed except as to its affirmance of the award for past maintenance.

Respectfully submitted,

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